(1) 89-812

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAWN ROBERTS,
Petitioner,

vs.

BREA HOSPITAL NEUROPSYCHIATRIC CENTER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The issue in this case is whether state courts, in determining a reasonable attorney fee under 42 U.S.C. §1988, can refuse to make the objective lodestar calculation, and instead rely completely on the subjective factors set forth in *Johnson v. Georgia Highway Express, Inc.* (5th Cir. 1974) 488 F.2d 714.

LIST OF PARTIES

The parties to the proceeding below are the Petitioner, Dawn Roberts, and the Respondent, Brea Hospital Neuropsychiatric Center.

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OPINIONS BELOW

The opinion denying review is printed in Appendix 1. The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, is printed in Appendix 2. The decision of the Orange County Superior Court is printed in Appendix 3.

JURISDICTION

The opinion of the Court of Appeal was filed May 31, 1989.

Review in the California Supreme Court was denied on August 17, 1989.

The jurisdiction of this Court is invoked under Section 1257(a) of Title 28 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves how a reasonable attorney's fee under 42 U.S.C. §1988 is to be calculated in a state court.

STATEMENT OF THE CASE

This Petition for Certiorari arises from an action concerning the propriety of the involuntary commitment of petitioner, Dawn Roberts, to Brea Hospital Neuro-psychiatric Center located in Brea, California.[1]

In 1983, Ms. Roberts was arrested by Officer Randall Toburen of the Huntington Beach Police Department during a dispute between them, and was taken to Brea Hospital for psychiatric evaluation and treatment pursuant to California Welfare and Institutions Code Sections 5150, *et seq*. These Sections are commonly known as the Lantherman-Petris-Short Act, and allow the involuntary psychiatric hospitalization and treatment of certain individuals in California.

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[1] The facts set forth in this Petition are supported by the record submitted to the California Court of Appeal in *Dawn Roberts v. Brea Hospital*, Appeal No. 600512.

Brea Hospital accepted Ms. Roberts for evaluation and confined her at that institution. A day later, Dr. Seawright Anderson certified Ms. Roberts as a candidate for an additional 14-day period of confinement and psychiatric treatment. He did so without an evaluation by a second physician, as required by the Act. Instead, he ordered a nurse to certify Ms. Roberts for further confinement. This action resulted in the involuntary confinement of Ms. Roberts at Brea Hospital for an additional four days, until she secured her release by way of Writ of Habeus Corpus issued July 19, 1983.

Suit was filed against Officer Toburen, his employer, the Huntington Beach Police Department, contending the arrest violated Ms. Roberts' civil rights. Claims were also made against Dr. Anderson, Dr. Record and respondent Brea Hospital, contending they failed to follow the requirements of the Lantherman-Petris-Short Act when confining Ms. Roberts, resulting in unlawful confinement and treatment, in violation of her civil rights.

Dr. Anderson was dismissed from the case by way of summary judgment, and appeal was taken, the judgment reversed, and a settlement reached.

Brea Hospital Neuropsychiatric Center, however, maintained throughout the underlying litigation that its actions were proper in every respect and refused to offer any monies in settlement. Discovery and pre-trial matters proceeded for four years, and the case went to trial against Brea Hospital, Randall Toburen and the City of Huntington Beach.

The trial lasted three weeks. By way of a special verdict, the jury found that Brea Hospital violated the Act by failing to have two physicians evaluate Ms. Roberts, and certify probable cause. It concluded this was a common practice at Brea Hospital, an institution which accepts many involuntary patients. Compensatory

and punitive damages in the sum of $10,000 and $1,000, respectively, were awarded Ms. Roberts. The jury also decided that Officer Toburen had probable cause to detain Ms. Roberts, awarded judgment in his favor, and consequently that of the City of Huntington Beach.

Pursuant to the authority of 42 U.S.C. Section 1988, Ms. Roberts then moved the trial court for an award of attorney's fees against Brea Hospital in the sum of $55,613.25. The request was based on 335.75 hours of attorney time at $135.00 per hour, and 205.75 hours of law clerk time at $50.00 per hour. The moving papers set forth in detail the services performed, the hours expended, and the basis for the hourly rate of which compensation was sought. The request included time spent during the course of three years on discovery, including five days spent by Brea's counsel deposing Ms. Roberts; time spent in depositions of other percipient and expert witnesses; time spent in court at required conferences; time spent in appellate work with respect to claims against Brea; time spent for the voluminous correspondence amongst and between counsel, and time spent in a three-week jury trial. Counsel for Ms. Roberts excluded time spent prosecuting claims against Dr. Anderson and Dr. Record, and for time spent making unsuccessful motions.

Ms. Roberts additionally requested that the award be augmented by a factor of 1.5, given the difficulty of the case, the contingent nature of her recovery and the financial risk counsel undertook in representing her.

Finally, a request for expert fees in the total sum of $5,125.00 was made.

The trial court agreed that Ms. Roberts was the prevailing party and entitled to an award of attorney's fees. It refused, however, to calculate a lodestar figure in determining the appropriate amount. It also failed to

rule on the issues of augmentation and expert fees. Instead, it awarded a total fee of $5,000 on a series of subjective findings, among them, that there existed a contingency fee contract between Ms. Roberts and her attorney, providing for a "customary" 33-1/3% or 40% fee; that Ms. Roberts prevailed in a "marginal" issue; and that the relief awarded ($11,000) was "marginal" against Ms. Roberts' request to the jury.

Ms. Roberts appealed this award to the Court of Appeal of the State of California, Fourth Appellate District, Division Three. In a split decision filed May 31, 1989, and over the strong dissent of Justice Wallin, the Court of Appeal upheld the trial court's decision. It ruled that a California Superior Court is not required to calculate a lodestar figure in determining a reasonable fee under 42 U.S.C. Section 1988. The court further held that Brea's policy of allowing only a single doctor to certify individuals for 14-day involuntary commitments (though in direct violation of the requirements of the Act) was a mere technical violation of the law. The court, therefore, concluded that given the small monetary recovery, and the "technicality" of the violation, $5,000 was adequate recompense for three years' work, including the three-week trial.

Review was sought by the California Supreme Court, who on August 17, 1989, declined to review the matter.

REASON FOR GRANTING THE WRIT

A STATE COURT MUST APPLY THE LODESTAR CALCULATION IN DETERMINING REASONABLE ATTORNEY'S FEES UNDER 42 U.S.C. §1988 AND THE CONTRARY CONCLUSION OF THE CALIFORNIA COURTS IS IN CONFLICT WITH ESTABLISHED AUTHORITY.

The Civil Rights Attorney Fee Award Act of 1976 was enacted to encourage private litigants to serve the public interest by bringing suit to vindicate civil rights. It allows in an action brought to enforce the provisions of 42 U.S.C. Section 1983, the court to award the prevailing party, a reasonable attorney fee. 42 U.S.C. §1988. Such fees are recoverable whether the action is brought in federal or state court. *Maine v. Thibotout* (1980) 448 U.S. 1.

Because a civil rights litigant is deemed to act as a "private attorney general" in protecting and preserving constitutional rights, it has also been recognized that plaintiffs should recover attorney's fees as a matter of course when they prevail, whereas victorious defendants should recover fees only when the suit was frivolous, unreasonable, or without foundation. *Hamilton v. Daly* (9th Cir. 1985) 777 F.2d 1202.

Thus, where plaintiff prevails on a Section 1983 claim, attorney's fees are mandatory, unless special circumstances would render the award unjust. *Ewap, Inc. v. City of Ontario* (1986) 177 Cal.App.3d 1108, 223 Cal.Rptr. 422.

In determining the fee to which a prevailing party is entitled, this Court has announced certain guidelines and determined that a lodestar calculation, *i.e.*, the number of

hours reasonable expended, multiplied by a reasonable hourly rate, must be made. *Blanchard v. Bergeron* (1989) __ U.S. __ , 109 S.Ct. 939; *City of Riverside v. Rivera* (1986) 477 U.S. __, 91 L.Ed.2d 466 at 476; *Hensley v. Eckerhart* (1983) 461 U.S. 424, 76 L.Ed. 240, 103 S.Ct. 1933.

As first stated in *Hensley*:

> "This calculation provides an objective basis on which to make an initial estimate and evaluation of services." 461 U.S. at 424.

The lodestar figure is presumed to be the reasonable fee to which counsel is entitled. *Blum v. Stenson* (1984) 465 U.S. 886.

In their fee request, counsel for Ms. Roberts set forth the reasonable hourly rate of attorneys and clerks then prevailing in the community for similar work performed by them in representing Ms. Roberts. The requested figures were established by reference to other reported cases where the rates awarded were discussed and by declaration of attorneys as to then prevailing standards in the community. Brea Hospital did not object to the rate requested, or otherwise present evidence contradicting the reasonableness of the hourly rate.

Similarly, counsel for Ms. Roberts presented a detailed breakdown of the number of hours he and members of his firm expended in litigating the matter. The time for which the fee was requested was broken down by dates, hours expended and services performed. Compensation was requested for time spent in research, law and motion, appellate work, extensive discovery, including interrogatories, requests for admissions, depositions; trial preparation, trial, preparation of the fee request, all of which is compensable time under the Attorney Fee

Act statute. *Webb v. County Board of Education* (1985) __ U.S. __, 105 S.Ct. 1923, 1929-30; *Serrano v. Unruh* (1982) 32 Cal.3d 621.

The trial court, however, concluded that Ms. Roberts was only entitled to the sum of $5,000 as attorney's fees. But in so doing, the court did not find that the hourly rate requested by Ms. Roberts was unreasonable. The court did not strike from the fee request any hours or services determined to be not reasonably well-spent in prosecuting the litigation. Instead, the court derived a figure of $5,000 from a series of findings totally unrelated to the lodestar calculation.

Despite this Court's mandate of a lodestar calculation, the California Court of Appeal upheld the refusal of the trial court to calculate a lodestar figure. The court concluded that under this Court's decision in *Hensley v. Eckerhart* (1983) 461 U.S. 424, it was appropriate for a state court to ignore the objective lodestar calculation and rely on the subjective factors set forth in *Johnson v. Georgia Highway Express, Inc.* (5th Cir. 1974) 448 F.2d 714.

However, this court has repeatedly limited reliance on the *Johnson* factors, concluding that they are subsumed within the lodestar calculation. In *Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air* (1986) 478 U.S. __, 92 L.Ed.2d 439, 106 S.Ct. 3088, you stated:

> "We further refined our views in *Blum v. Stenson* 465 U.S. 886, 79 L.Ed.2d 891, 104 S.Ct. 1541 (1984). Blum restated that the proper first step in determining a reasonable attorney's fee is to multiply the 'number of hours times a reasonable hourly rate.' *Id.* at 888, 79 L.Ed.2d 891, 104 S.Ct. 1541. We emphasized, however, that the

> figure resulting from this calculation is more than a mere 'rough guess' or initial approximation of the final award to be made. Instead, we found that 'when . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee to which counsel is entitled. . . .'
>
> *Blum* also limited the factors which a district court may consider in determining whether to make adjustments to the lodestar amount. Expanding on our earlier finding in *Hensley* that many of the *Johnson* factors are 'subsumed within the initial calculation' of the lodestar, we specifically held in *Blum* that the 'novelty' and complexity of the issues, 'the special skill and experience of counsel', the 'quality of representation', and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount. . . ." 92 L.Ed. at 456.

The foregoing passage teaches that not only is the lodestar calculation *required*, once the fee applicant meets his burden of showing that the rate and number of hours spent on the claim are reasonable, *the number obtained is presumed to be the fee to which counsel is entitled.* It further teaches that the bulk of the *Johnson* factors are included within the lodestar calculation, among them: the results obtained, the novelty and complexity of the issues, the special skill and experience

of counsel, and the quality of representation, all factors upon which the state court improperly relied in this case.

A view that subjective factors can be considered in lieu of lodestar was also recently expressed by another California Appeals Court in *Sokolow v. County of Mateo* (1989) 261 Cal.Rptr. 520, __ Cal.App.3d __. There, in remanding a case for determination of a reasonable fee under §1988, the court made no mention of the lodestar calculation, but instead relied extensively on *Hensley, supra*, for the proposition that the decision is one for the trial court to equitably make; a decision which will not be disturbed if the court provides a "concise but clear explanation of its reasons for the fee award, making clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *Id.* at 530.

It is submitted that this court in deciding *Hensley*, never intended that decision to become justification for a subjective approach to determining attorney's fees without regard to the objective approach enunciated therein. The latter decisions of this Court in *Blum, City of Riverside* and *Blanchard, supra*, all teach that the objective lodestar calculation is not only required, but presumed to be the reasonable fee. Nonetheless, California State Courts are refusing to make a lodestar calculation in favor of subjectivity.

Not only has this created a split between state and federal courts in California (*See, e.g., Chalmers v. City of Los Angeles* (9th Cir. 1986) 796 F.2d 1205, *amended* 808 F.2d 1373, on *remand* 676 F.Supp. 1515) it has created a roadblock to pursuing such claims in California State Courts.

As this Court has repeatedly recognized, and so eloquently stated in the dissent to the Court of Appeals' ruling herein:

> "The continued existence of civil rights litigation as a protector of individual rights and liberties depends upon the willingness of court and judges to award reasonable attorney's fees to successful litigants, bearing in mind that attorneys for unsuccessful litigants bear all of the costs of their defeat. Without adequate fee awards even rights now protected by legislation such as those embodied in the Lanterman-Petris-Short Act, will be meaningless because their denial will not result in effective sanctions. We should not pay lip-service to the law while imposing financial starvation on those who seek to enforce it . . ."

The Congress of this great Nation has seen fit to allow civil rights actions be brought in state court as well as federal court. California courts are forcing civil rights cases into already overburdened federal courts by refusing to objectively calculate attorney's fees under 42 U.S.C. §1988. By so acting, the courts are thwarting the will of Congress and further narrowing remedies of individuals whose civil rights are violated. It is respectfully requested that this Court stop this practice by holding that fee determinations under 42 U.S.C. §1988, made in state or federal courts, be determined under the same objective standards.

CONCLUSION

Accordingly, it is requested that this Court issue a writ and decide the matter in the first instance. Alternatively, it is requested that a writ issue ordering the California Courts to recalculate the attorney's fee herein, first determining a lodestar.

Respectfully submitted,

LAW OFFICES OF FRED L. WRIGHT

BY: FRED L. WRIGHT

Attorneys for Petitioner
DAWN ROBERTS

APPENDIX 1

O R D E R D E N Y I N G R E V I E W

AFTER JUDGMETN BY THE COURT OF APPEAL

Fourth Appellate District, Division Three, No. G005512, SO 11058

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

I N B A N K

SUPREME COURT
F I L E D
AUG 17, 1989
Robert Wandruff
Clerk
_____Deputy

DAWN ROBERTS, Appellant

v.

BREA HOSPITAL NEUROPSYCHIATRIC CENTER,

Respondent.

Appellant's petitionf or review DENIED.

Kaufman, J., is of the opinion the petition should be granted.

APPENDIX 2

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

DAWN ROBERTS,	)	G005512
	)	(Case # 42-30-88)
Appellant,	)	**OPINION**
	)	
vs.	)	COURT OF APPEAL
	)	4th DIST.
BREA HOSPITAL,	)	F I L E D
etc., et al.,	)	MAY 31, 1989
	)	
Respondent	)	
	)	

Appeal from a judgment of the Superior Court of Orange County, Robert A. Knox, Judge. Affirmed.

Fred L. Wright for Plaintiff and Appellant.

Harrington, Foxx, Dubrow & Canter, Dale B. Goldfarb, Edward R. Leonard, and Michele Carmeli, for Defendant and Respondent.

* * *

Plaintiff Dawn Roberts obtained a modest recovery against but one of a number of defendants; nevertheless, she challenges the sufficiency of a $5,000 attorneys fees award. We affirm.

I.

Roberts was taken into custody by a Huntington Beach police officer on July 14, 1983, and transported to Brea Hospital Neuropsychiatric Center for observation. (Welf. & Inst. Code, §5150.)[1/] After the 72-hour period,

1/ Section 5150 provides for prompt evaluation and treatment of persons with serious mental disorders. Where probable cause exists, peace officers may detain any person who, "as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled" and place that person in a county-designated facility for an initial 72-hour period for treatment and evaluation. (Cont'd, pg. 3)

Brea personnel certified her as a candidate for a 14-day commitment; but the order was not signed by two physicians, as required by Welfare and Institutions Code section 5251. Instead, Roberts claimed the one psychiatrist who did evaluate her ordered a nurse who had not participated in the examination to sign the statutory notice of certification.

Roberts remained in Brea for three days under the statutorily invalid commitment before counsel secured her release via a writ of habeas corpus.

(Cont'd from pg. 3) Welf. & Inst. Code, §5150.) Extended periods of confinement may follow. (Welf. & Inst. Code, §§5250 [14 days], 5300 [up to 90 days].)

She sued the City of Huntington Beach, the arresting officer, Brea, and two staff physicians, claiming, among other things, damages for violation of her federal civil rights and statutory attorneys fees (42 U.S.C. §§1983, 1988).

The physicians prevailed on pretrial motions for summary judgment and judgment on the pleadings. In a jury trial against the remaining defendants, Roberts was awarded $10,000 in compensatory damages and $1,000 in punitive damages against the hospital only. The jury returned defense verdicts in favor of the city and the police officers, finding probable cause for the detention. The jury also determined the hospital had probable cause to admit her initially.

Roberts' counsel filed a motion

for attorneys fees under 42 United States Code Section 1988, requesting a "lodestar" sum of $55,613.25. [2/] He also sought to increase that figure by a factor of 1.5 based on the difficulty of the case and the financial risk in representing the client on a contingent fee basis. The motion included a request for $5,125 in expert witness fees.

2/ The lodestar figure is calculated by "'[multiplying] the number of hours reasonably expended on the litigation [] by a reasonable hourly rate.'" (City of Riverside v. Rivera (1986) 477 u.S. 561, 568.) The request by Roberts' counsel was based on 335.75 attorney hours at $135 per hour and 205.75 hours of law clerk time at $50 per hour. In Rivera the Supreme Court implicitly approved payment for law clerk time under section 1988 (id., at p.565).) According to the attorney's declaration, "most of the time spent litigating [] claims [against the prevailing defendants, i.e., city, the police officer, and the two physicians was] eliminated from consideration."

The trial court determined Roberts prevailed on a "marginally significant issue" and awarded only $5,000 in attorneys fees. The court declined to augment the award by any multiplier or to reimburse Roberts for expert witness fees.

II.

The United States Supreme Court has determined that a fee award in a civil rights action based on the lodestar formula is "presumed to be the reasonable fee contemplated by [42 United States Code section] 1988." (City of Riverside v. Rivera, supra, 477 U.S. at p.568; see also Blum v. Stenson (1984) 465 U.S. 886, 897.) Consequently, argues Roberts, the court's failure to apply this formula in this case must be viewed as an abuse of discretion mandating

reversal. That contention has already been rejected by the United States Supreme Court, however: "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. . . . [And] where the plaintiff achieved only limited success, the . . . court should award only that amount of fees that is reasonable in relation to the results obtained." (Hensley v. Eckerhart (1983) 461 U.S. 424, 440, emphasis added.) To this end, the Supreme Court has endorsed a 12-factor test for determining a reasonable fee in any particular case. 3/

3/ Congress has approved the factors analysis, too. (Cont'd, pg. 8)

The criteria were first set forth in Johnson v. Georgia Highway Express, Inc. (5th Cir. 1974) 488 F.2d 714, 717-719 and include the following: "(1) [T]he time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the

3/ Cont'd. No. 94-1011, ___Sess., p.6 (1976) and H.R. Rep. No.94-1558, __ Sess., p. 8 (1976).)

experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." (City of Riverside v. Rivera, supra, 477 U.S. at p.567, fn.3.) Considering these factors, the $5,000 award in this case was clearly reasonable.

The verdict in plaintiff's favor against the hospital was no surprise, as the trial court recognized: Plaintiff only needed to establish by a preponderance of the evidence that the hospital failed to satisfy the statutory requirements for a 14-day extended commitment, and proof of that omission was certainly not difficult to come by. By contrast, proof of the liability of the other defendants

persistently eluded plaintiff. Consequently, the degree of success achieved by Roberts was hardly significant. Nevertheless, the court still awarded her attorneys fees which amounted to almost one-half the jury's verdict. Applying the rule that "[f]ee awards are to be reasonable, reasonable as billing rates and reasonable as to the number of hours spent in advancing the successful claims" (Blanchard v. Bergeron (1989) -- U.S. --, -- [109 S.Ct. 939, 946], emphasis added), we find no error.

Moreover, the jury's monetary award -- not challenged here by Roberts -- appears to be within the range of reasonable damages for a technically improper hospital commitment of three days' duration. Thus, this case stands in contrast to

those where only a token sum was awarded to redress a widespread violation of civil rights or to establish a principle of broad impact. (See, e.g., City of Riverside v. Rivera, supra, 477 U.S. at p.576 [warrantless entry by police with use of unnecessary force when no probable cause to believe crime was being committed]; Blum v. Stenson, supra, 465 U.S. 886 [ineligibility for Supplemental Security Income program does not automatically terminate Medicaid benefits].) In this case, a law designed to safeguard the rights of mentally disturbed individuals is already on the books; the only real issue vis-a-vis Brea was whether it violated the law and, consequently, Roberts' rights. Roberts and her attorney were after money, not

principle; and they appear to have seriously overvalued her case, since only one of the defendants was found liable and the recovery did not even approach the jurisdictional limit of the municipal court. Viewed in perspective, this case was not a victory for the plaintiff, far from it. Under these circumstances, we cannot find the award so unreasonable as to constitute an abuse of discretion.

We have studied the United States Supreme Court's latest examination of attorneys fees issues in civil rights cases, Texas State Teachers v. Garland Indep. School D. (1989) -- U.S. -- [109 S.Ct., 1486], and find it supports our position. In that case the court did hold the plaintiff need not prevail on the so-called "central

issue" in order to be entitled to a lodestar recovery; but it also concluded, "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote the fee statute. Where such a change has occurred, the degree of plaintiff's overall success goes to the reasonableness of the award under Hensley, not to the availability of a fee award vel non." (Id. at p.1493.) As discussed above, the trial court's determination was perfectly consistent with the formula approved in Hensley; the amount awarded was reasonably proportionate to plaintiff's limited success.

III.

Roberts next argues the court

erred in denying reimbursement for expert witness fees as out-of-pocket expenses incurred during trial. (See, e.g., Laffey v. Northwest Airlines, Inc. (D.C. Cir. 1984) 746 F.2d 4, 30.) The Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. §1988) contains no specific provision for recovery of expert witness fees; but whether they can be recovered in section 1983 actions appears to be an open question nonetheless. (See Crawford Fitting Co. v. J.T. Gibbons, Inc. (1987) -- U.S. --, [107 S.Ct. 2494, 2500, fn.1] (dis.opn. of Marshall, J.).)

Generally, in the absence of a statute litigants bear these costs, although courts sitting in equity may order one party to pay expert witness fees in certain narrowly defined instances, e.g., to preserve a common

fund or to punish a vexatious or oppressive litigant or where there has been wilful disobedience of a court order. (International Woodworkers v. Champion Intern. (5th Cir. 1986) 790 F.2d 1174, 1176-1177, affd. sub. nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., supra, -- U.S. -- [107 S.Ct. 2494].) In all other cases, "absent explicit statutory or contractual authorization", courts cannot allow expert witness fees as costs which exceed the amounts specified in 28 United States Code section 1821. (Crawford Fitting Co. v. J.T. Gibbons, Inc., supra, at p.--- [at p.2499].) Roberts makes no claim that any of the recognized equitable exceptions apply; and, while we have not been provided a reporter's transcript of the trial, our examination of the record strongly

indicates the expert testimony she offered had little, if anything, to do with the basis of her recovery. The trial court properly rejected her claim for expert fees.

IV.

Finally, Roberts requests attorney fees for prosecution of this appeal. (See Ewap, Inc. v. City of Ontario (1986) 177 Cal.App.3d 1108, 1118.) Since she has not prevailed, however, an award of fees would not be appropriate.

Judgment affirmed. Respondent is entitled to costs.

Crosby, Acting P.J.

I concur:

Sonenshine, J.

Wallin, J.

I dissent. The majority unfairly trivializes the successful result obtained in the trial, and approves an attorney's fees "award" which is an insult to counsel. This cavalier treatment of a claim for attorney's fees kills, through financial starvation, the exercise of important rights under federal law and ignores recent controlling United States Supreme Court decisions.

The Legislature enacted the Lanterman-Petris-Short Act (Welf. & Inst. Code, §5000 et seq.) "[t]o end the inappropriate, indefinite, and

involuntary commitment of mentally disordered persons . . . ." (Welf. & Inst. Code, §5001(a).) As the majority notes, the act permits certification of a person taken into custody for a 14-day commitment provided the order has been signed by two examining physicians. Apparently Brea Hospital routinely ordered 14-day commitments based on the evaluation of one psychiatrist who would then order a nurse to sign as the second evaluator. As a result, Roberts was illegally committed. Presumably many others less able to assert, or less aggressive in asserting, their statutory rights have suffered the same fate. Roberts' legal victory should end this practice and protect the liberty of all citizens potentially subjected to it. I do not

agree that her loss of liberty was trivial and insignificant merely because she was able to secure release after three days.

The record discloses Brea Hospital aggressively defended Roberts' civil rights action. Her victory was achieved only after extensive pretrial proceedings and a three-week jury trial. Nevertheless, the majority suggests that an award of only $5,000 for attorney's fees was not an abuse of discretion. "The award bears no rational relationship to the actual fees incurred, and while there is nothing in the record to implicate the use of passion or prejudice, [I] suspect <u>something</u> was amiss. The only explanation [I] can divine for the meager award is the trial judge's unrealistic view of what

constitutes a reasonable value for legal services. An award of attorney's fees and costs must be measured by the economics of the times. Currently, lawyers' minimum hourly rates far exceed their predecessors'. In days past the sum of [$5,000] may have been sufficient to [prosecute] a lawsuit of this nature; today it is not." (Hadley v. Krepel (1985) 167 Cal.App.3d 677, 686-687.)

For more than a generation major advances in civil rights have been achieved through litigation in the state and federal courts. Beginning with Brown v. Board of Education of Topeka (1954) 347 U.S. 483 major strides toward equal rights for racial minorities, women and the handicapped, have been taken through victories won

in the courts of this nation. Civil rights plaintiffs are frequently unpopular individuals or members of unpopular groups. They have been deprived of rights which are significant but not easily measured in monetary terms. The continued existence of civil rights litigation as a protector of individual rights and liberties depends upon the willingness of courts and judges to award reasonable attorney's fees to successful litigants, bearing in mind that attorneys for unsuccessful litigants bear all of the costs of their defeat. Without adequate fee awards even rights now protected by legislation, such as those embodied in the Lanterman-Petris-Short Act, will be meaningless because their denial will not result in effective

sanctions. We should not pay lip service to the law while imposing financial starvation on those who seek to enforce it.

The United States Supreme Court has recognized that attorney's fees in civil rights cases frequently substantially exceed the actual dollar amount of any award. For example, in Riverside v. Rivera (1986) 477 U.S. 561, the court affirmed a fee of $245,456.25 even though damages of only $33,350 were recovered. The Supreme Court expressly rejected the argument that in cases where monetary damages are recovered, the fees should be proportionate to the recovery. "The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under [42 U.S.C.] §1988.

[Citation.] It is, however, only one of many factors that a court should consider in calculating an award of attorney's fees. We reject the proposition that fee awards under 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." (Id., at p.574.) The court went on to state, "[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms . . . [A] successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards." (Ibid.)

"Because damages awards do not reflect fully the public benefit advanced by civil rights litigation,

Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief." (Id. at p. 575.) In enacting an attorney's fees provision for civil rights actions 942 U.S.C. §1988), Congress determined "that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. [Citation.]" (Id., at p. 576.)

Part of my disagreement with the majority, and the trial court, stems from the apparent acceptance that the fees awarded to Roberts' attorneys should be substantially related to the monetary damages awarded. Congress has expressly rejected any concept that fees should somehow be

proportioned according to the recovery. As the Supreme Court noted, "A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting §1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case." (Id., at p. 578.)

No attorney would be willing to

undertake representation of individuals whose liberty has been denied for short periods of time, such as the three days in Roberts' case, if the fee was dependent upon the amount of money awarded.

Despite this apparently clear statement in Riverside, the Supreme Court was again recently confronted with a lower court decision which erroneously assumed attorney's fees should somehow be related to the contingent fee contract between the plaintiff and counsel. Some language in Johnson v. Georgia Highway Express, Inc. (5th Cir., 1974) 488 F.2d 714 also suggested that a fee award should not exceed the amount that plaintiff is contractually obligated to pay counsel. The court held an award of fees greater than the contingency

agreement is not a "windfall" to counsel, explaining, "Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim. . . .[] The contingent fee model, premised on the award to an attorney of an amount representing a percentage of the damages, is thus inappropriate for the determination of fees under §1988." (Blanchard v. Bergeron (1989) -- U.S. --, --, [109 S.Ct. 939, 946].)

No one could seriously contend that any litigated civil rights claim pursued through a jury trial could be

completed with a reasonable fee expenditure of not more than $5,000. The award made by the trial court, and approved by the majority, amounts to a punishment -- and even an insult -- to counsel for having the temerity and courage to undertake a civil rights case on behalf of an allegedly mentally disordered individual. I would remand this case to the trial court for a new hearing to determine, in accordance with controlling Supreme Court decisions, the reasonable value of the pretrial and post-trial attorney's fees and costs, including those pertaining to this appeal. (See

Hadley v. Krepel, supra, 167 Cal.App.3d at p. 687.)[1/]

Wallin, J.

1/ I do agree with the majority's resolution of the claim for expert witnesses' fees. The record does not establish that these fees related to the successful claims advanced in the trial court. As the majority notes, the Supreme Court has apparently left for future determination the question of whether expert witness fees are recoverable when a prevailing party seeks "a reasonable attorney's fee as part of the costs" in a civil rights action. (42 U.S.C. §1988.) While I believe the Supreme Court will ultimately conclude those fees should be recovered by a successful plaintiff, it is unnecessary for us to decide the question here.

APPENDIX 3

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE

Dept. 4

Court convened at ___ M__ May 27 1987, present Hon. Robert A. Knox, Judge: _____, Deputy Clerk; _____ Deputy Sheriff; _____ Reporter; and the following proceedings were had:

42-30-88 ROBERTS VS. BREA HOSPITAL NEUROPSYCHIATRIC CENTER, ET AL.

Huntington Beach in the amount of $12.50.

Summary: Total amount stricken in the amount of $1,579.78 subtracted from $5,725.78 leaves $4,146.00, the amount allowed.

Plaintiff's Motion for Award of Attorney's Fees against defendant Brea Hospital Neuropsychiatric Center

is allowed in the amount of $5,000.00.

Relative to the basis for the award of the Court makes the following findings:

1. That the plaintiff was the prevailing party in a marginally significant issue given the totality of the issues and the major thrust of plaintiff's case.

2. That the Court declines to divide hours worked between the winning claim and the balance of the case because of the interrelation of the issues and the difficulty of ascertaining what efforts and hours were devoted to the winning claim.

3. That the questions involved were not significantly novel or difficult.

4. That although plaintiff's counsel represented plaintiff with the

competency requisite for the nature of the case the matter was not requiring unusual or specialized skills.

5. That no evidence was presented on the question of whether plaintiff's counsel was precluded from other employment by acceptance of this case.

6. That there was a contingent fee contract providing for the customary 33-1/3% or 40% recovery.

7. That there was no evidence as to the nature and length of the professional relationship of plaintiff and her counsel.

8. That the relief obtained was limited and marginally significant in comparison with the scope of the litigation as a whole in that plaintiff's award for compensatory damages was $10,000 plus $1,000

punitive against her request of approximately $700,000.

Clerk to mail a copy of this minute order to each counsel.

ENTERED: 5-27-87

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

Dawn Roberts,
Petitioner,
vs.
Brea Hospital Neuropsychiatric Center,
Respondent.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

DALE GOLDFARB, ESQ.
HARRINGTON, FOX, DUBROW & CANTER
30th Floor
611 West 6th Street
Los Angeles, CA 90017

That affiant makes this service, for FRED L. WRIGHT, Counsel of Record, LAW OFFICES OF FRED L. WRIGHT, Attorneys for Petitioner herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Donald A. Johnson

On November 15, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

Notary Public in and for
said county and state